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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1690

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT AMERICAN PETROLEUM INSTITUTE

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QUESTION PRESENTED

Whether the Court of Appeals acted properly in affirming orders of the Federal Communications Commission which implemented a policy of unlimited resale and sharing of private line communications services when those orders were promulgated pursuant to notice and comment hearing procedures, and were based on reasoned consideration and substantial evidence?

STATEMENT OF THE CASE

The Federal Communications Commission ("FCC" or "Commission") commenced this proceeding to consider the lawfulness of common carriers tariff provisions which permitted subscribers to engage in sharing and resale of private line communication services, but denied these same privileges to other subscribers.[1] These selective restrictions were initiated by the carriers, and they had never been called upon to justify such provisions. This proceeding represented one of the first attempts by the FCC to examine the lawfulness of these restrictions under the Communications Act of 1934, as amended. 47 U.S.C. §151 *et. seq.* ("Act") (App. B, 5b.)[2] The impetus for the FCC's inquiry came in large part from the urgings of various parties who desired to engage in resale and sharing but were prohibited from doing so under existing tariffs.

At the outset of the proceeding, the Commission explained:

> The nature of the issues that must be considered, their complexity, their basic impact on the overall structure of the industry, the number and diversity of parties interested in the issues as well as the expedition with which they must be resolved compels the conclusion that the fulfillment of our regulatory mandate requires that the questions that have been raised in the context of various discrete mat-

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[1] *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, Notice of Inquiry and Proposed Rulemaking ("Notice")*, 47 F.C.C.2d 644 (1974).

[2] Contrary to the allegations of cross-petitioner American Telephone and Telegraph Company (AT&T), no authority has been cited which indicates that either the FCC or any federal court has ever sustained the lawfulness of resale and sharing restrictions.

ters before us be considered in a broad rulemaking proceeding.[3]

The Commission further indicated that the basic issues in the proceeding could be divided into two separate and distinct questions, namely: (1) whether the selective prohibitions against resale and sharing were just, reasonable and non-discriminatory; and, (2) whether, and to what extent the Commission should regulate shared use arrangements and resale operations.[4]

The FCC conducted proceedings which involved six rounds of evidentiary submissions by interested parties. Based on the record, the Commission found that existing restrictions on resale and sharing of communication services were unjust, unreasonable and unlawfully discriminatory under the Act.[5] (App. B, 6b-8b, 39b-52b.) After weighing the potential adverse impact of its decision and the countervailing benefits, the Commission found that permitting unlimited resale and sharing was just and reasonable. In order to make the perceived benefits generally available, the Commission adopted this communications policy for application, prospectively, throughout the entire industry.

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[3]*Notice, supra,* 47 F.C.C.2d at 645, cited in *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities ("Report and Order")*, 60 F.C.C.2d 261 (1976), reproduced in the Appendix to No. 77-1540 ("App.") App. B, 14b.

[4]Selective "resale" and "shared use" arrangements were permitted under AT&T tariffs at the time this proceeding was initiated. *See, e.g. Report and Order* App. B, 131b-135b.

[5]The Commission indicated that if experience proved there was any sizeable shift of revenue requirements as a result of its action, a proceeding dealing with that issue would be initiated. *In the Matter of Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, Memorandum Opinion and Order*, 62 F.C.C.2d 588 (1977). (App. C, 17c.)

On the issue of regulating sharing and resale, the Commission found that sharing was not a common carrier activity and therefore need not be regulated as such. However, resale activities were deemed to be common carriage requiring appropriate regulation under Title II of the Act. (App. B, 92b-101b.)

The court below, the United States Court of Appeals for the Second Circuit, upheld the Commission's orders in their entirety. It concluded that the Commission, acting in a rule making capacity, was not required to hold a "trial-type" hearing, and that notice and comment procedures were appropriate to resolve the issues in this proceeding. (App. A, 9a-12a.) The court also found that the Commission's orders were supported by substantial evidence and based on a reasoned consideration of that evidence. (App. A, 13a.) Additionally, the Court indicated that where carrier-initiated tariffs were found to be unlawful, the FCC was not bound to conduct exhaustive economic impact studies before taking action. As the Court explained: "The FCC may institute broad policy changes while leaving for future proceedings the fine tuning of the rate structure required to adjust for the economic impact of those changes." (App. A, 15a.)

International Business Machines Corporation ("IBM") filed a petition for a writ of certiorari, No. 77-1540, seeking review of the narrow question of whether resellers of communications services should be regulated as common carriers. Although AT&T opposed that petition, it nevertheless filed a conditional cross-petition for a writ of certiorari seeking review of additional issues.

ARGUMENT

The cross-petition does not present issues worthy of review by this Court.[6] Cross-petitioner AT&T concedes as much by advocating that this Court should not review the decision below. (AT&T Brief in Opposition in No. 77-1540.) Furthermore, there is no interrelationship between the issues presented for review in the two petitions. Therefore, this Court need not grant AT&T's Petition solely on its alleged relationship to No. 77-1540.

The bases on which Cross-Petitioner AT&T rests its argument for review by this Court are the alleged "serious" and "substantial doubts" that exist regarding the validity of the Commission's orders. These contentions seriously mistake the history of FCC policy making proceedings and relevant decisions of this Court.

I.

THE DECISION BELOW IS CONSISTENT WITH FEDERAL AND SUPREME COURT DECISIONS DEALING WITH THE HEARING ISSUE AND WITH PAST ADMINISTRATIVE PRACTICE OF THE FEDERAL COMMUNICATIONS COMMISSION

After a thorough analysis of the appropriate statutory hearing requirements and relevant case law, the FCC concluded that a trial-type hearing was not required in a proceeding which primarily addressed general policy issues of a prospective nature, applicable to an entire industry. (App. B, 118b-131b.) Additionally, the Commission indicated that the selected "notice and comment" procedures were consistent with its practice in similar proceedings

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[6]This Brief in Opposition is intended to demonstrate why the conditional cross-petition filed by AT&T (No. 77-1690) should be denied. It is not intended to take any position on the issues raised in No. 77-1540.

and would be most conducive to a thorough examination of the issues.[7]

AT&T asserts that "evidentiary hearings"[8] were required in this proceeding to meet the requirements of Section 205(a) of the Act. As authority for this proposition, AT&T cites procedures followed by the FCC in two ratemaking proceedings. AT&T's analogy to ratemaking proceedings is inappropriate since, in this proceeding, the FCC was considering broad policy issues and specifically reserved the issue of rates for a separate proceeding, if necessary. (App. C, 17c.)[9]

Contrary to cross-petitioner's assertion, the Second Circuit has not reached conflicting conclusions on the question of the type of hearing procedures required under Section 205(a) of the Act. The three Second Circuit cases cited by AT&T[10] do not consider the issue of the type of "hearing" required by Section 205(a). Furthermore, these cases involved the prescription of rates

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[7] *In the Matter of AT&T High Density - Low Density Rate Structure*, 45 F.C.C.2d 88 (1974); *In the Matter of Bell System Tariff Offerings of Local Distribution Facilities For Use By Other Common Carriers*, 46 F.C.C.2d 413, 418-19 (1974); First Report and Order, *Specialized Common Carrier Inquiry*, 29 F.C.C.2d 870 (1971), *aff'd sub nom. Washington Util. & Transp. Comm'n v. FCC*, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975).

[8] Cross-Petitioner never explains what it means by "evidentiary hearings," nor does it explain why the proceedings of the FCC did not constitute an evidentiary hearing.

[9] The Court of Appeals recognized that the FCC was acting in a rulemaking capacity pointing out that this proceeding involved policy and legialtive-type issues, which "cannot be decisively resolved by testimony." (App. A, 12a.)

[10] *AT&T v. FCC*, 487 F.2d 865 (2d Cir. 1973); *National Association of Motor Bus Owners v. FCC*, 460 F.2d 561 (2d Cir. 1972); and *AT&T v. FCC*, 449 F.2d 439 (2d Cir. 1971).

which is not an issue in the instant proceeding.[11] Faced for the first time in this case with the question of the type of hearing required under Section 205(a) in policy making proceedings, the Court of Appeals found that the "notice and comment" procedures followed in this instance met the applicable hearing requirements.

The Court of Appeal's decision is also consistent with its previous interpretation, and that of the Third Circuit, of similar hearing provisions under other sections of the Communications Act.[12] The decision in this case, therefore, is consistent with well established administrative and judicial precedent.

Contrary to AT&T's next assertion, the court below has not misinterpreted this Court's ruling in *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973). AT&T characterizes the Court of Appeals' interpretation of *Florida East Coast* as "sweeping", and finds an apparent disregard for this Court's recognition that the word "hearing" may have a "host of meanings". However, cross-petitioner fails to identify how the Court of Appeals' analysis of the hearing issue "conflicts" with the decision in *Florida East Coast.*

In *Florida East Coast*, this Court held that trial-type hearings were not required under provisions of the Inter-

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[11] In *AT&T v. FCC, supra* at 449 F.2d 439, the court held that since prescribing unlimited sharing of AT&T's bulk rate offering would have the effect of a rate reduction, the FCC must make a finding that its prescription of a lower rate was just, fair and reasonable under the Act.

[12] *RCA Global Communications, Inc. v. F.C.C.*, 559 F.2d 881 (2d Cir. 1977) holding that the "full hearing" requirement found in Section 222(e)(3) could be satisfied by "notice and comment" proceedings; *Bell Telephone Co. of Pennsylvania v. F.C.C.*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975) holding that the requirement of "opportunity for hearing" in Section 201(a) was satisfied by "notice and comment" procedures.

state Commence Act[13] similar to the Communications Act provisions under review by the court below. *Florida East Coast* recognized, as did the Court of Appeals, that adjudicatory procedures are not necessary to formulate a basically legislative-type judgment for prospective application. *Id.* at 410 U.S. 247.[14] Since Section 205(a) did not require that a hearing be "on the record," and there was no independent statutory basis requiring adjudicatory procedures, the court below properly found, in accordance with *Florida East Coast,* that a trial-type hearing was not required.

The ultimate issue in this proceeding is not, as AT&T purports, the economic impact of the FCC's decision, but whether resale and sharing restrictions are lawful, and how resale and sharing should be regulated to assure compliance with the Communications Act. Despite AT&T's contention, the Commission does not have a duty to exhaustively review the financial impact of its decision. The court below, citing the recent decision of the Fourth Circiut Court of Appeals on this same issue in *North Carolina Utilities Commission v. F.C.C.* 552 F.2d 1036 (4th Cir. 1977), *cert. denied,* 98 S.Ct. 222 (1977), found that the FCC was not required to "conduct exhaustive economic impact studies before taking action", and that in any event, its decision was fully supported by reasoned consideration and substantial evidence. (App. A, 13a-15a.) In so holding the court below followed well established

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[13] 49 U.S.C. §1(14)(a).

[14] The court's decision below is also in accord with this Court's recent holding in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* 98 S.Ct. 1197 (1978) which recognizes an agency's broad discretion to fashion its own procedures to carry out its statutory duties.

principles for judicial review of agency action. *See, In re Permian Basin Area Rate Cases,* 390 U.S. 747 (1968).

Nor does *Atchison, T. & S.F. Ry. Co. v. Wichita Board of Trade,* 412 U.S. 800 (1973), cited by AT&T, stand for the proposition that an agency must undertake an exhaustive economic analysis to meet its burden of justifying its decisions with substantial evidence and reasoned consideration. That case holds, rather, than an agency must explain with reasonable thoroughness the basis for a change in policy. Therefore, the court below applied the proper standard for review of the FCC's decision.

II.

THE ISSUES RAISED BY CROSS-PETITIONER ARE SEPARATE AND DISTINCT FROM THOSE RAISED IN NO. 77-1540

The Commission originally formulated two basic issues to be addressed in this proceeding. One involved the lawfulness of existing tariff restrictions on resale and sharing imposed by the carriers. The second concerned whether and to what extent the Commission should regulate resale and shared use arrangements. (App. 13b-14b.) The Commission's orders explained that each of these issues was significant in its own right, but that it would undertake the resolution of both these issues in one broad rulemaking proceeding. (App. B, 14b.)

AT&T mischaracterizes the relationship between the issues presented. Dealing with these issues separately would *not* prevent, as AT&T alleges, a complete and meaningful adjudication of this controversy. The basic flaw in AT&T's logic is that it improperly assumes that there is a dependent relationship between the procedures followed by the Commission in prescribing a policy of unlimited resale and sharing, and those followed in

deciding that resellers will be regulated as common carriers. No such dependent relationship exists merely because two distinct policy decisions, based on totally different considerations, are reached in the same proceeding. The Commission's policy determinations were discussed in separate and independent sections of its orders with no indication whatsoever that the decision to regulate resellers was premised on any factor other than its finding that resellers were common carriers. The decision of the Second Circuit affirmed the Commission's two policy determinations, in separate sections of its opinion, and based its affirmance on individual and independent reasons. (App. A, 9a-21a.)

Furthermore, certain selected groups were already allowed to engage in resale activities under existing tariffs at the time this proceeding began. (App. B, 131b-148b.) The Commission could have initiated a proceeding concerning the regulation of these groups without considering, at the same time, the lawfulness of the tariff restrictions themselves. The Commission's decision to regulate resellers in this proceeding was not "premised" on its action concerning tariff restrictions, and therefore these issues need not be considered together.

Finally, this Court can exercise its discretion and consider only those issues in a particular case which are worthy of review. Review of issues presented on a writ of certiorari is not a matter of right, but of sound judicial discretion. Just as this discretion operates in deciding which cases are to be reviewed, it can also operate to select the issues to be argued and decided in a particular case. This practice enables the Court to direct its atten-

tion to those issues worthy of review, and discard those issues which do not require review.[15]

CONCLUSION

For the reasons stated above, the conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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[15] *See, e.g., Gregg v. United States*, 393 U.S. 932 (1968); *Davis v. Mississippi*, 393 U.S. 821 (1968); and *Regal Knitwear Co. v. N.L.R.B.*, 323 U.S. 692 (1944) wherein this Court limited the granting of a writ of certiorari to specific issues in each case.